

123 FERC ¶ 61,252
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Westar Energy, Inc.

Docket Nos. ER08-808-000
ER08-809-000

ORDER ESTABLISHING HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued June 6, 2008)

1. On April 8, 2008, in Docket No. ER08-808-000, Westar Energy, Inc. (Westar) filed what it characterizes as a Petition for Approval of Settlement Agreement (Settlement Agreement) between Westar and the City of Mindenmines, Missouri (Mindenmines) requesting the Commission to approve without condition or modification the Settlement Agreement, the associated pro forma rate schedule and a Cost-Based Formula Rate Agreement for Full Requirements Electric Service (Formula Rate Agreement) between Mindenmines and Westar.
2. On April 8, 2008, in Docket No. ER08-809-000, Westar also filed proposed revisions to its Wholesale Electric Service Agreement¹ (WES Agreement) between Kansas Gas and Electric Company² and Mindenmines to extend the term of the WES Agreement for the period that the Formula Rate Agreement is pending before the Commission. In Docket No. ER08-809-000, Westar also submitted a Notice of Cancellation for the WES Agreement.³

¹ Second Revised Sheet Nos. 10 and 1 to the Wholesale Electric Service Agreement dated December 8, 1987, designated First Revised Rate Schedule FERC No. 179.

² Kansas Gas and Electric Company is a wholly owned subsidiary of Westar providing electric service in south-central and southeastern Kansas.

³ Westar requests an effective date of May 31, 2008, for the proposed Second Revised Sheet No. 10 to extend the WES Agreement and an effective date consistent with the Formula Rate Agreement for the proposed Notice of Cancellation. *See* Westar's Cover Letter in Docket No. ER08-809-000 at p. 3.

3. As discussed below, this order sets Westar's proposed Formula Rate Agreement and attendant pro forma rate schedule for hearing and settlement judge procedures.

I. Background

4. Westar is a public utility primarily engaged in the generation, transmission, distribution and sale of electric energy with its principal office located in Topeka, Kansas. Westar's transmission system is located in eastern and central Kansas and is under the control of the Southwest Power Pool, Inc., which is a Commission-approved regional transmission organization. Westar provides firm capacity and energy to Mindenmines under the WES Agreement.

5. Mindenmines is a municipality located in Barton County, Missouri. Mindenmines purchases electric power and energy and resells it to its customers within the franchised or certificated retail service territory that it has a statutory or contractual obligation to serve.

6. Under the WES Agreement, Westar provides fixed-rate bundled service to Mindenmines. On December 31, 2004, Westar gave Mindenmines notice that Westar was terminating the WES Agreement effective December 31, 2007. On November 2, 2007, Westar, with Mindenmines's agreement, filed to extend the term of the WES Agreement through May 31, 2008, in order to provide Mindenmines the opportunity to secure a new source of supply. As part of the November 2, 2007 filing, Westar also filed to cancel the WES Agreement effective June 1, 2008. The Commission, by letter order, granted Westar's requests.⁴

7. On September 27, 2004, as amended on September 30, 2004, Westar submitted an updated market power analysis in compliance with the Commission's Implementation Order.⁵ Westar's updated market power filing indicated that it passed the pivotal supplier screen in all markets considered, and that it passed the wholesale market share screen in all of the markets except for its home control area and the Midwest Energy, Inc. (Midwest) and Aquila Networks-West Plains Kansas (WPEK) control areas.

⁴ See *Westar Energy, Inc.*, Docket No. ER08-180-000 (Dec. 18, 2007) (unpublished letter order).

⁵ *Acadia Power Partners, LLC*, 107 FERC ¶ 61,168 (2004) (Implementation Order), *order on reh'g*, 110 FERC ¶ 61,178 (2005). The Implementation Order addressed the procedures for implementing the Commission's new interim generation market power analysis and mitigation policy announced in the Commission's April 14, 2004 Order in *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018 (2004), *order on reh'g* (SMA Rehearing Order).

8. On March 23, 2005, the Commission instituted a proceeding under section 206 of the Federal Power Act (FPA)⁶ concerning the justness and reasonableness of Westar's market-based rates in the Westar, Midwest and WPEK control areas. Westar proposed to use cost-based measures to address the Commission's requirements to mitigate market power. On September 26, 2006, the Commission issued an order, finding that Westar should make sales with terms of more than one year on an embedded cost-of-service basis.⁷

9. Westar states that, in light of the anticipated May 31, 2008, termination date of the WES Agreement and the Commission's findings in the Mitigation Order, it engaged in extensive negotiations with Mindenmines regarding the terms under which Westar would provide capacity and firm energy to Mindenmines. According to Westar, the proposed Formula Rate Agreement is the result of those discussions. Westar further states that the Formula Rate Agreement, by its terms, does not become effective until the first day of the month following the date that a Commission order becomes final approving, without condition or modification, or accepting, without condition or modification, the Formula Rate Agreement.

II. Description of the Filings

10. Under the proposed Formula Rate Agreement, Westar will sell capacity and firm energy to Mindenmines. Westar will provide generation-related service at a cost-based formula rate under which (a) the Variable Operations and Maintenance (VOM) component of the Energy Charge and the Demand Charge will change from year to year;⁸ and (b) the Energy Charge will change from month to month.⁹ Westar will arrange for transmission, ancillary and distribution services and pass through the costs it incurs for arranging those services. The initial term of the Formula Rate Agreement is for twenty years and shall continue year to year thereafter until cancelled by one of the parties, with three years prior written notice to the other party.

11. Under the Formula Rate Agreement, the Demand Charge and VOM Charge will not exceed Westar's average embedded cost. The Energy Charge includes the VOM Charge and fuel-related costs.

⁶ 16 U.S.C. § 824e (2000).

⁷ *Westar Energy Inc.*, 116 FERC ¶ 61,219 (2006) (Mitigation Order); *order on reh'g*, 123 FERC ¶ 61,123 (2008).

⁸ The components of these charges are set forth in Appendix 1 to Attachment D of the Formula Rate Agreement.

⁹ The Energy Charge will be subject to a true-up set forth in Attachment D.

12. The Demand Charge for each contract year, except the final contract year, will be the lesser of (a) the latest Demand Charge produced by the formula rate template included on Appendix 1 to Attachment D; or (b) 110 percent of the prior contract year's Demand Charge.¹⁰ Westar proposes to derive the return on equity (ROE) annually under a formula that adds 535 basis points to the average of the daily Moody's Investors Service's Long-Term Baa Corporate Bond Index for December, subject to a floor and a ceiling of 9 percent and 18 percent, respectively. Under the proposed Formula Rate Agreement, a "public interest" standard of review will govern any proposed changes to the proposed ROE methodology, and other specified provisions.¹¹

13. In order for the WES Agreement to remain in effect while the Formula Rate Agreement is pending before the Commission, Westar requests that the Commission accept the proposed extension of the term of the WES Agreement effective May 31, 2008, and allow the proposed Notice of Cancellation to take effect at the same time that the Formula Rate Agreement takes effect. Westar states that it will notify the Commission of the effective date of the cancellation of the WES Agreement within ten days of the date that the Formula Rate Agreement is no longer pending before the Commission.

III. Notice of Filings

14. Notice of Westar's filings was published in the *Federal Register*, 73 Fed. Reg. 22,145 (2008), with interventions and protests due on or before April 29, 2008. Occidental Chemical Corporation and Occidental Power Marketing, L.P. (collectively, Occidental) filed a timely motion to intervene and protest. On May 14, 2008, Westar filed a motion for leave to answer and answer.

15. Occidental argues that Westar incorrectly filed the Formula Rate Agreement under Rule 207(a)(5) of the Commission's Rules of Practice and Procedure.¹² Occidental explains that Westar's rate filing is for new service with an existing customer and contends that, therefore, Westar's filing must comply with the requirements set forth in section 35.13 of the Commission's Regulations.¹³ Occidental maintains that Westar has failed to comply with these regulations.

¹⁰ The Demand Charge for the final contract year will be the latest Demand Charge produced by the formula rate template.

¹¹ Article XII.2 of the Formula Rate Agreement.

¹² See 18 C.F.R. § 385.207(a)(5) (2007).

¹³ See 18 C.F.R. § 35.1(c) (2007).

16. Occidental asserts that Westar has failed to provide any incremental cost information or any assurance that captive customers will not subsidize the cost of serving Mindenmines. Occidental contends that, because the Formula Rate Agreement may involve a subsidy from captive customers, it may unjustly support Westar's wholesale sales activity, thus frustrating competition by giving Westar an unduly competitive advantage.

17. Occidental asks the Commission to either reject Westar's filing or set it for hearing. Occidental further requests that the Commission direct Westar to file all of the information required by section 35.13 of the Commission's regulations.

IV. Discussion

A. Procedural Matters

18. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2007), Occidental's timely, unopposed motion to intervene serves to make it a party to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure¹⁴ prohibits the filing of an answer to a protest or answer unless otherwise ordered by the decisional authority. We are not persuaded to accept Westar's answer and will, therefore, reject it.

B. Hearing and Settlement Judge Procedures

19. Occidental's argument that Westar incorrectly filed the Formula Rate Agreement because it did not comply with the requirements of section 35.13 of the Commission's Regulations amounts to an argument that Westar's filing is patently deficient. Having evaluated Westar's filing, we find that it minimally satisfies our threshold filing requirements and is not patently deficient. Therefore, we shall deny the request for rejection.

20. Westar's proposed Formula Rate Agreement raises issues of material fact that cannot be resolved based on the record before us, and that are more appropriately addressed in the hearing and settlement judge procedures ordered below.

21. In light of *Maine Pub. Util. Comm'n v. FERC*, 520 F.3d 464 (D.C. Cir. 2008) (*Maine PUC*), the Commission may not accept the standard of review as currently written with regard to third parties in this new agreement. As such, the standard of review provision in the Formula Rate Agreement is accepted conditioned on the parties revising the standard of review applicable to third parties consistent with the Commission's decision in *Duke Energy Carolinas, LLC*, 123 FERC ¶ 61,201 at P 10 & n.10 (2008).

¹⁴ 18 C.F.R. § 385.213(a)(2) (2007).

Westar should, within thirty days of the date of this order, file a revised standard of review provision consistent with this precedent. Thus, the standard of review is not set for hearing.

22. Our preliminary analysis indicates that Westar's proposed Formula Rate Agreement has not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Therefore, we will set Westar's proposed Formula Rate Agreement and attendant pro forma rate schedule for hearing and settlement judge procedures.¹⁵

23. While we are setting these matters for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their dispute before the hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.¹⁶ If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding; otherwise the Chief Judge will select a judge for this purpose.¹⁷ The settlement judge shall report to the Chief Judge and the Commission within 30 days of the date of the appointment of the settlement judge, concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge. Should the settlement judge ultimately determine that a hearing is warranted, Westar shall file a full case in chief pursuant to the Commission's regulations to support its proposed rate structure at hearing.

24. In order to ensure continued service to Mindenmines, we will accept Second Revised Sheet No. 10 of the WES Agreement so that the WES Agreement remains in effect while the Formula Rate Agreement is pending. We will also accept Second Revised Sheet No. 1 to supersede First Revised Sheet No. 1 of the WES Agreement, thus delaying the cancellation of the WES Agreement until Westar notifies the Commission of the date of cancellation, which it must do within ten days of the date that the Formula Rate Agreement is no longer pending before the Commission.

¹⁵ Ultimately, actual tariff sheets would need to be filed rather than pro forma tariff sheets.

¹⁶ 18 C.F.R. § 385.603 (2007).

¹⁷ If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of the date of this order. The Commission's website contains a list of Commission judges and a summary of their background and experience (www.ferc.gov – click on Office of Administrative Law Judges).

The Commission orders:

(A) Second Revised Sheet No. 10 and Second Revised Sheet No. 1 to Westar's Rate Schedule FERC No. 179, are accepted for filing as discussed in the body of this order.

(B) Westar shall file a revised standard of review provision, as discussed in the body of the order, within thirty (30) days of the date this order issues.

(C) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R., Chapter I), a public hearing shall be held concerning Westar's proposed Agreement. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (D) and (E) below.

(D) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2007), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five (5) days of the date of this order.

(E) Within thirty (30) days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(F) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, NE, Washington, DC 20426. Such a conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and

to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

By the Commission. Commissioners Kelly and Wellinghoff dissenting in part with a joint statement attached.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

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Westar Energy, Inc.

Docket Nos. ER08-808-000
ER08-809-000

(Issued June 6, 2008)

KELLY and WELLINGHOFF, Commissioners, dissenting in part:

We write separately in order to discuss the “public interest” standard of review that the parties propose to govern any changes to the Formula Rate Agreement’s return on equity methodology and other specified provisions. We agree with the order’s finding that this proposal clearly conflicts with the recent decision of the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) in *Maine Public Utilities Commission v. FERC*.¹ In our view, the *Maine PUC* decision set forth the “just and reasonable” standard as the proper standard of review for changes to an agreement sought by a non-party or the Commission acting *sua sponte*.² Therefore, we would have accepted the Formula Rate Agreement’s standard of review provision, conditioned upon the parties revising this provision to apply the “just and reasonable” standard of review to non-parties and the Commission acting *sua sponte*.

Instead, the majority directs the parties to file a revised standard of review consistent with their decision in *Duke Energy Carolinas*. In *Duke Energy Carolinas*, the majority stated that “the Commission would find acceptable a substitute provision that imposes on non-contracting third-parties ‘the most stringent standard permissible under applicable law.’”³ We believe this statement is striking when contrasted with the *Maine PUC* decision. In *Maine PUC*, the D.C. Circuit made clear that when a rate challenge is brought by a non-contracting third party, the “proper standard of review” is the “just and reasonable” standard.⁴ In addressing an issue that has often been plagued by

¹ *Maine Public Utilities Commission v. FERC*, 520 F.3d 464, 476-79 (D.C. Cir. 2008) (*Maine PUC*).

² See *Duke Energy Carolinas, LLC*, 123 FERC ¶ 61,201 (2008) (Cmm’rs. Wellinghoff and Kelly dissenting in part) (*Duke Energy Carolinas*).

³ *Duke Energy Carolinas, LLC*, 123 FERC ¶ 61,201 at P 10 n.10.

⁴ *Maine PUC*, 520 F.3d at 478.

uncertainty,⁵ it is unfortunate that the majority has adopted a policy of inviting parties to submit ambiguous contractual language.

Further, we emphasize that it is our belief that the D.C. Circuit's rationale in the *Maine PUC* decision applies equally to changes to an agreement sought by the Commission acting *sua sponte*. As the court explained, the *Mobile-Sierra* doctrine applies to preserve the terms of a bargain "as between the contracting parties."⁶ The Commission is not a party to an agreement that it accepts under section 205 of the Federal Power Act (FPA).⁷ Moreover, in section 206 of the FPA, Congress gave the Commission not only a statutory right, but also a responsibility, to take action as necessary "upon its own motion."⁸ As the D.C. Circuit found with respect to challenges brought by non-parties that the statutory language of section 206 of the FPA "is quite clear,"⁹ the proper standard of review is the "just and reasonable" standard when the Commission fulfills its responsibility by acting *sua sponte* pursuant to section 206 of the FPA.

Finally, it is clear that the use of the "just and reasonable" standard is fully consistent with promoting certainty and stability in energy markets. The Commission uses the "just and reasonable" standard judiciously in considering contract modification,¹⁰ and we will continue to do so following the D.C. Circuit's

⁵ See, e.g., *Notice of Proposed Rulemaking on Standard of Review for Modifications to Jurisdictional Agreements*, 113 FERC ¶ 61,317, at P 7 (2005).

⁶ *Maine PUC*, 520 F.3d at 478.

⁷ 16 U.S.C. § 824d (2000 & Supp. V 2005).

⁸ 16 U.S.C. § 824e (2000 & Supp. V 2005).

⁹ *Maine PUC*, 520 F.3d at 478.

¹⁰ In Order No. 888, for example, the Commission stated that it "does not take contract modification lightly" and indicated that an entity "has a heavy burden in demonstrating that the contract ought to be modified" even under the "just and reasonable" standard. *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036, at 31,664-65 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

Maine PUC decision. We believe that such action strikes an appropriate balance between recognizing parties' needs for certainty with respect to their agreements and protecting the interests of energy consumers.¹¹

For these reasons, we respectfully dissent in part.

Suede G. Kelly
Commissioner

Jon Wellinghoff
Commissioner

¹¹ There are many reasons why the Commission may decline to modify an agreement after applying the “just and reasonable” standard. For example, it may be relevant whether the original agreement has broad-based benefits, whether that agreement was negotiated through a stakeholder process that reflected a wide range of interests, and whether state commissions had meaningful opportunity to participate in such a stakeholder process.